FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BOBBY HENRY,
Petitioner-Appellant,
v.
PEGGY KERNAN, Warden; DANIEL E. LUNGREN, Attorney General,
Respondents-Appellees.

No. 98-15768

D.C. No.
CV 95-02055-DAD

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
January 12, 1999—San Francisco, California

Filed May 26, 1999
Amended October 25, 1999

Before: Joseph T. Sneed, A. Wallace Tashima, and
Barry G. Silverman, Circuit Judges.

Opinion by Judge Tashima

SUMMARY

Criminal Law and Procedure/Evidence

The court of appeals reversed a judgment of the district court. The court held that a defendant's confession is involuntary and inadmissible at trial for any purposes when it follows psychologically coercive questioning and unheeded requests for counsel.

Appellant Bobby Henry was arrested for killing Bill Withrow. Following his arrest, he was questioned for several hours by Detectives White and Machen. The detectives continued to question Henry after he requested counsel. His statements to the police were rambling, disjointed, often unresponsive to the questions, occasionally inaudible and sometimes virtually incoherent. Throughout the interview he was shaken, confused and frightened, crying in parts and frequently asking for forgiveness. At one point, Detective White told Henry that "what you say can't be used against you right now" and further commented, "we just want to know."

In response to this further questioning, Henry gave a detailed confession.

Henry was tried for murder. His first trial ended in mistrial. At a hearing in the second trial, Henry sought to suppress his post-*Miranda* statements to the detectives on the ground that the questioning violated his Fifth Amendment right to silence and his right to counsel. The state court agreed that the statements violated *Miranda* and excluded them from the prosecutor's case in chief. The court found, however, that the statements were voluntary and could be used to impeach Henry if he testified.

Prior to the killing, Henry confided in Dr. Sander, a physician whom he believed to be a psychotherapist, that he felt like killing Withrow and a number of other people. At the state court hearing, Henry also sought to exclude the doctor's testimony on the ground that it was covered by the California psychotherapist-patient privilege. The court held that the privilege did not apply because it was unreasonable for Henry to believe that Dr. Sander was a psychotherapist.

Two other witnesses testified that Henry had complained about Withrow and one testified that Henry had commented to her that someone should kill Withrow.

Henry testified that he acted in self-defense and the post-arrest statements were introduced to impeach him. The prosecution called Detective Machen as a witness and played the entire tape recording of Henry's interrogation for the jury. Each juror was also provided with a copy of the transcript of the interview.

Henry was convicted. After exhausting his state court claims, Henry filed a petition for habeas corpus, contending that: (1) his statements to police interrogators were elicited in violation of the Fifth Amendment, were involuntary, and were improperly admitted at trial; and (2) the trial court's admission of his statements to his doctor violated his constitutional right to privacy.

The district court denied his petition for habeas corpus. Henry appealed.

[1] To prevail on his Fifth Amendment claim, Henry had to demonstrate that: (1) his statements were obtained by the police in violation of *Miranda*; (2) the state court committed error in permitting the prosecution to use these improper statements; and (3) the error had a substantial and harmful influence on the jury's determination of its verdict.

[2] It was uncontested that the police deliberately violated Henry's *Miranda* rights by continuing with their interrogation after he unequivocally requested an attorney.

[3] Under the Fourteenth Amendment, a confession is involuntary only if the police use coercive means to undermine the suspect's ability to exercise his free will. Voluntariness depends on such factors as the surrounding circumstances and the combined effect of the entire course of the officers' conduct upon the defendant.

[4] Henry's questioning by the detectives was psychologically coercive. Throughout the interview he was shaken, con-

fused and frightened. [5] White's statements were deliberately designed to undermine Henry's ability to control the time at which the questioning occurred, the subjects discussed, and the duration of the interrogation. Such misleading comments were intended to convey the impression that anything said by Henry would not be used against him for any purposes.

[6] Because the police tactics and trickery produced a confession which was neither rational nor the product of an essentially free and unconstrained choice, Henry's post-*Miranda* statements were involuntary and, therefore, inadmissible for any purpose.

[7] The sheriff's officers set out in a deliberate course of action to violate *Miranda*. [8] In California, out-of-court statements admitted for impeachment are, in fact, admitted for the purpose of proving the defendant's guilt. No limiting instruction was given that Henry's post-*Miranda* statements could be used only to assess Henry's credibility.

[9] The state should not be permitted to use post-*Miranda* statements where the officers set out deliberately to violate a suspect's *Miranda* rights, and the evidence obtained in violation of *Miranda* is used to prove the defendant's guilt, even though it is admitted in the guise of impeachment.

[10] The introduction of Henry's post-*Miranda* statements for impeachment purposes had a substantial and injurious effect on the jury. [11] The prosecution's use of the statements went to the root of their burden to prove beyond a reasonable doubt that Henry acted with the intent required for a conviction of first or second degree murder, and not in self-defense. This had a substantial effect on the verdict. No other evidence could have impressed the jury in the same way that the defendant's own statements did.

[12] There is no constitutional psychotherapy-patient privilege. At best, Henry's challenge to the admissibility of Dr.

Sander's testimony was a challenge to an evidentiary ruling based on state law. [13] A federal habeas court cannot review questions of state evidence law. A federal court will interfere only if it appears that the admission of the evidence violated fundamental due process and the right to a fair trial.

[14] Henry did not make a showing that the admission of Dr. Sander's testimony violated due process or his right to a fair trial. Two other witnesses testified that Henry had complained about Withrow; one of the witnesses testified that Henry told her that someone should kill Withrow. Dr. Sander's testimony was not the only evidence that Henry stated that he felt like killing Withrow.

COUNSEL

Connie M. Alvarez, Assistant Federal Defender, Sacramento, California, for the petitioner-appellant.

Gregory W. Baugher, Assistant Attorney General, Sacramento, California, for the respondents-appellees.

ORDER

The opinion filed May 26, 1999, is amended as follows:

On slip opinion page 5056, following the second full paragraph (177 F.3d at 1158, following the first full paragraph, left-hand column), immediately preceding Part II.B, add the following four (4) paragraphs:

> The State contends, as its fallback position, that Henry's post-*Miranda* statements did not lose their voluntariness until after Henry's inquiry of whether he was "supposed to keep talking without an

attorney," was interrupted by Detective White's statement, "Listen, what you tell us we can't use against you right now . . . We'd just would like to know." By that time, Henry had already made a series of admissions. We recognize, of course, that a post-*Miranda* voluntary statement may be used for impeachment purposes. *See, e.g., Harris v. New York*, 401 U.S. 222, 226 (1971); *Cooper*, 963 F.2d at 1250. Even assuming, however, that the State's fall-back contention would ordinarily have convincing force, there are two factors in this case which, when combined, distinguish this case from past cases.

The first factor is that the sheriff's officers set out in a deliberate course of action to violate *Miranda*. As the State has acknowledged, "it has been conceded that the detectives knew they were violating *Miranda* when they continued questioning the petitioner after he requested counsel . . . ." (State's Petition for Rehearing and Suggestion for Rehearing En Banc at 2-3.) The State's concession is supported by the record. Thus, like *Cooper*, this case is also distinguishable from *Harris* in that

> *Harris* was a case where no claim [was made] . . . that the police knowingly engaged in calculated misconduct in order to secure the disputed evidence. Moreover, it does not appear that the purpose of the police in *Harris* in securing the disputed evidence was to impinge on the suspect's right to remain silent or his right to testify. In these respects, *Harris* is manifestly distinguishable and thus inapposite to the present case.

Cooper, 963 F.2d at 1249 (brackets in the original) (internal quotation marks omitted) (citing *Harris*, 401 U.S. at 224).

The second factor is that in California out-of-court statements admitted for impeachment are also admitted for the truth of the matters asserted therein, *i.e.*, also admitted for substantive purposes. *See* Cal. Evid. Code §§1220, 1235. Thus, in California, out-of-court statements admitted for impeachment are, in fact, admitted for the purpose of proving the defendant's guilt. No limiting instruction was given in this case that Henry's post-Miranda statements could be used only to assess Henry's credibility, the classic use of prior inconsistent statements for impeachment, but not to establish the truth of the matters asserted therein. In fact, in this case, the primary evidence which established Henry's motive and rebutted his claim of self-defense was Henry's post-*Miranda* statements. Thus, it is a misnomer to say that Henry's post-*Miranda* statements were admitted for "impeachment." Their primary use was to establish an essential element of the crime charged, as the prosecution argued.

Based on the specific facts of this case, we conclude that the State should not be permitted to use post-*Miranda* statements where the officers set out deliberately to violate a suspect's *Miranda* rights and the evidence obtained in violation of *Miranda* is used to prove the defendant's guilt, even though it is admitted in the guise of impeachment. Thus, for this further reason, we conclude that the state trial court erred in permitting the prosecution to use Henry's post-*Miranda* statements for the truth of the matters asserted therein, as well as for impeachment as a prior inconsistent statement.

With the foregoing amendment, the panel has voted unanimously to deny the petition for panel rehearing. Judges Tashima and Silverman vote to deny the petition for rehearing en banc and Judge Sneed so recommends. The full court has

been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are denied.

OPINION

TASHIMA, Circuit Judge:

We must decide whether a confession concededly obtained in violation of *Miranda*[1] was involuntarily made so as to prohibit its use for impeachment purposes at trial. Contrary to the recommendation of the magistrate judge, to whom the case had been referred, the district court denied habeas relief to Bobby Henry ("Henry"), finding that his Fifth Amendment privilege against self-incrimination and his constitutional right to privacy were not violated. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, and we reverse and remand.

I.

Henry was arrested for killing Bill Withrow after he turned himself in to the Sacramento County Sheriff's Department. Following his arrest, Henry was questioned for several hours by Detectives White and Machen. The two detectives continued to interrogate Henry after he requested counsel. In response to the detectives' further questioning, Henry made a detailed confession.

An information was filed in the Sacramento County Superior Court charging Henry with murder. The first trial ended in a mistrial after the jury deadlocked. At the second trial, a

---

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

hearing was held to determine whether Henry's post-*Miranda* statements to the detectives were admissible for impeachment purposes. Henry sought to have his statements suppressed on the ground that the questioning violated his Fifth Amendment right to silence and his right to the assistance of counsel. The state court agreed that the statements violated *Miranda* and excluded them from use during the prosecution's case-in-chief. It found, however, that the statements were voluntary and therefore could be used for impeachment purposes if Henry testified.

Some months prior to the killing, Henry, a civilian employee at McClellan Air Force Base, was referred by his supervisor to Dr. Sander, an occupational health physician on the base. Henry confided in Dr. Sander that he felt like killing a number of people, including Withrow, who had allegedly cheated Henry out of his life savings. At the time of his discussions with Dr. Sander, Henry believed him to be the "base shrink."

At the state court hearing, Henry also sought to exclude Dr. Sander's testimony on the ground that it was covered under the California psychotherapist-patient privilege, Cal. Evid. Code § 1014. Whether Henry had a reasonable belief that Dr. Sander was a psychotherapist was a central issue at the hearing. The trial court ruled that the psychotherapist-patient privilege did not apply because it was unreasonable for Henry to believe that Dr. Sander was a psychotherapist.

Henry testified that he acted in self defense and the post-arrest statements were introduced to impeach him during cross-examination. The prosecution subsequently called Detective Machen as a rebuttal witness and played the entire tape recording of Henry's interrogation for the jury. Each juror was also provided with a copy of the transcript of the interview. Henry was convicted of second degree murder.

After exhausting his claims in state court, Henry filed the instant petition for habeas relief under 28 U.S.C. § 2254. He contends that: (1) his statements to police interrogators were elicited in violation of the Fifth Amendment, were involuntary, and were improperly admitted for any purpose at trial; and (2) the trial court's admission of his statements to his doctor violated his constitutional right to privacy. The district court denied his petition for habeas corpus and issued a certificate of probable cause.[2] Henry timely appealed.

II. Fifth Amendment Claim

The district court's decision to grant or deny a § 2254 habeas petition is reviewed de novo. *See Eslaminia v. White*, 136 F.3d 1234, 1236 (9th Cir. 1998). Findings of fact relevant to the district court's decision are reviewed for clear error. *See Moran v. McDaniel*, 80 F.3d 1261, 1268 (9th Cir. 1996). State court factual determinations are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *See Villafuerte v. Stewart*, 111 F.3d 616, 626 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 860 (1998); *Collazo v. Estelle*, 940 F.2d 411, 416 (9th Cir. 1991) (en banc).

[1] To prevail on his Fifth Amendment claim, Henry must demonstrate that: (1) his statements were obtained by the police in violation of *Miranda*; (2) the state court committed error in permitting the prosecution to use these improper statements; and (3) the error had a substantial and harmful influence on the jury's determination of its verdict. *See Pope v. Zenon*, 69 F.3d 1018, 1020 (9th Cir. 1996). Post-*Miranda* confessions which are found to be involuntary may not be admitted for any purposes, including impeachment. *See*

[2]Because the petition was filed prior to April 24, 1996, the date of enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), the AEDPA does not apply to this case. *See Lindh v. Murphy*, 521 U.S. 320, 323-24 (1997); *Crandell v. Bunnell*, 144 F.3d 1213, 1315 n.1 (9th Cir. 1998).

United States v. Polanco, 93 F.3d 555, 560 (9th Cir. 1996). Accordingly, we must first determine whether Henry's statements to the police were voluntary.

A. Voluntariness of confession.

[2] It is uncontested that the police officers in this case deliberately violated Henry's *Miranda* rights by continuing with their interrogation after he unequivocally requested an attorney. Despite this violation, both the state trial court and the district court found, and the State continues to argue, that the petitioner's statements were "voluntary and not the result of coercion," and therefore admissible for impeachment.

The voluntariness of a confession is reviewed de novo, *see Collazo*, 940 F.2d at 415, as is the presence of coercive police activity, *see Derrick v. Peterson*, 924 F.2d 813, 818 (9th Cir. 1990). The state court's conclusion regarding whether Henry's confession was voluntary is also reviewed de novo, as it is a legal conclusion, and therefore not entitled to a presumption of correctness. *See Collazo*, 940 F.2d at 415; *Medeiros v. Shimoda*, 889 F.2d 819, 822 (9th Cir. 1989).

Henry contends that the California trial court erred in allowing his post-*Miranda* statements to be used for impeachment purposes, since he was subjected to psychological coercion from the detectives during his interrogation. The State counters that although the detectives did continue illegally to question Henry after he had invoked his right to counsel, the statements he made were voluntary, and thus properly admitted at trial.

[3] Under the Fourteenth Amendment, a confession is involuntary only if the police use coercive means to undermine the suspect's ability to exercise his free will. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Derrick*, 924 F.2d at 818. Voluntariness depends on such factors as the surrounding circumstances and the combined effect of the entire

course of the officers' conduct upon the defendant. *See Polanco*, 93 F.3d at 560. The test of voluntariness is well established: "Is the confession the product of an essentially free and unconstrained choice by its maker? . . . The line of distinction is that at which governing self-direction is lost *and compulsion, of whatever nature or however infused*, propels or helps to propel the confession." *Collazo*, 940 F.2d at 416 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)) (alteration in the original).

A review of the interview transcript illustrates that Henry's questioning by the detectives was psychologically coercive. Although both the California Court of Appeal and the district court found that the interrogation was conducted calmly in a relaxed setting,[3] this determination is belied by the actual record of the interrogation.

The interview proceeded as follows: After some general initial inquiries, the officers told the defendant that he was under arrest for murder, and advised him of his rights. Henry responded by asking if he could have his lawyer there, then saying he should probably have a lawyer, and finally confirming that he wanted an attorney. Despite these clear and repeated invocations of his *Miranda* rights, however, the officers continued to question Henry. Immediately after Henry's request for an attorney, Detective White asked, "Why did you shoot him anyway?" When Henry responded "Pardon," the officer again asked, "Why did you shoot him?" The officers then proceeded to interrogate Henry for an hour.

[3]The district court found that all of the participants in the interview, including the defendant, spoke in a "quiet, matter of fact tone of voice." This finding, however, does not undermine the conclusion that Henry was confused and frightened. Although the tone of Henry's voice may have been "matter of fact" in the beginning of the interview, the transcript shows that he was sobbing by its end. Further, distress is not invariably reflected in the tone of voice; fear can manifest itself in many ways. The interview transcript reveals a confused and frightened defendant who garbled his sentences, was frequently inaudible, and was often entirely incoherent for long passages.

In response to Detective White's initial two questions as to why he had shot Withrow, Henry answered that he had written multiple checks to Withrow, that Henry couldn't figure out how much money Withrow owed him, that Withrow had "cheated [him] out of money," and that due to his loss of savings, Henry was losing his property. Immediately after these statements, Henry inquired whether he was "supposed to keep talking without an attorney." Detective White interrupted him to state, "Listen, what you tell us we can't use against you right now . . . We'd just would like to know."

[4] At that, petitioner began a long, often incoherent, and confused statement which began, "It started two years after the divorce," and included not only information about Henry's interactions with Withrow but also about Henry's divorce, his property, his automobile accident and head injury, his job, his guns, his children, deer hunting, an old vehicle his brother-in-law was fixing, his experiences in Vietnam, taking his trailer up in the woods, and his frustrated ambition to be a highway patrolman. As evidenced by the transcript, Henry's statements were rambling, disjointed, often unresponsive to the questions asked by the officers, occasionally inaudible, and sometimes virtually incoherent. Throughout his interrogation, petitioner was shaken, confused, and frightened, crying in parts and frequently asking for forgiveness.

[5] We conclude that the slippery and illegal tactics of the detectives overcame Henry's will and that he continued his confession only as a result of their deception. Officer White's statement that "what you say can't be used against you right now" was deliberately designed to undermine Henry's ability to control the time at which the questioning occurred, the subjects discussed, and the duration of the interrogation. Such misleading comments were intended to convey the impression that anything said by the defendant would not be used against him for any purposes. White's further comment that "we just

want to know" reinforced that false impression by suggesting that the officers merely sought to satisfy their curiosity.

In a case with strikingly similar facts, we held that the police's intentional violation of a suspect's *Miranda* rights by continued interrogation rendered any subsequent statements involuntary. *See Cooper v. Dupnik*, 963 F.2d 1220, 1240-41 (9th Cir. 1992) (en banc). In *Cooper*, the Arizona police followed a plan to ignore the suspect's invocation of his constitutional right to remain silent, as well as any request he might make to speak with an attorney, and to interrogate him until he confessed. Although the officers knew any confession thus generated would not be admissible in evidence in the prosecution's case-in-chief, the Arizona police, like the Sacramento sheriffs here, hoped it would be admissible for impeachment if the suspect ever went to trial. *See id.* at 1224.

The *Cooper* defendant, like Henry, "was reduced to a state of agitation and anxiety marked by tears and sobbing . . . He repeated his request for an attorney . . . [t]his request, which contain[ed] a statement of unwillingness to talk, as well as a desire to consult an attorney, was disregarded." *Id.* at 1231. As the *Cooper* Court forcefully stated:

> The conduct of the police in the present case . . . is precisely the type of conduct that concerned the Court in *Miranda* and its immediate predecessor, *Escobedo v. Illinois*. The Court in *Miranda* made clear that it remained concerned about the use of physical brutality in the pursuit of confessions, but it focused primarily on psychological coercion . . . . [The] Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.

Id. at 1241-42 (citations and quotations omitted).

Like the Sacramento sheriffs, the Arizona police refused to honor Cooper's rights when he asserted them, and simply continued questioning him as if no request for counsel had been made. This tactic was designed to generate a feeling of helplessness, and, as we concluded, it was successful:

> [Defendant]'s treatment presents a prima facie case of law-enforcement behavior that violates the Fifth Amendment's privilege against self-incrimination. We stress again that this case does not deal with a product of police interrogation that is just technically involuntary, or presumptively involuntary, as those terms are used in *Miranda* jurisprudence, but with a product that was involuntary *because it was actively compelled and coerced* by law-enforcement officers during in-custody questioning.

Id. at 1243.

[6] As we have previously noted, "*Miranda* expresses concern about the compelling pressures that weigh upon a person in custody, pressures that can break a person's free will and cause that person to talk involuntarily." *Collazo*, 940 F.2d at 417. Detective White took unfair advantages of these pressures. At a point where the law required him to back off, he did not scrupulously honor Henry's right to cut off questioning; instead, he ignored it. Any minimally trained police officer should have known such pressure was improper and likely to produce involuntary statements. *See id.* Because the police tactics and trickery produced a confession which was neither rational nor the product of an essentially free and unconstrained choice, we hold that Henry's post-Mirandized statements were involuntary, and therefore inadmissible for any purpose. The state trial court erred in permitting the prosecution to use these statements for impeachment purposes.

The State contends, as its fallback position, that Henry's post-*Miranda* statements did not lose their voluntariness until

after Henry's inquiry of whether he was "supposed to keep talking without an attorney," was interrupted by Detective White's statement, "Listen, what you tell us we can't use against you right now . . . We'd just would like to know." By that time, Henry had already made a series of admissions. We recognize, of course, that a post-*Miranda* voluntary statement may be used for impeachment purposes. *See, e.g., Harris v. New York*, 401 U.S. 222, 226 (1971); *Cooper*, 963 F.2d at 1250. Even assuming, however, that the State's fallback contention would ordinarily have convincing force, there are two factors in this case which, when combined, distinguish this case from past cases.

[7] The first factor is that the sheriff's officers set out in a deliberate course of action to violate *Miranda*. As the State has acknowledged, "it has been conceded that the detectives knew they were violating *Miranda* when they continued questioning the petitioner after he requested counsel . . . ." (State's Petition for Rehearing and Suggestion for Rehearing En Banc at 2-3.) The State's concession is supported by the record. Thus, like *Cooper*, this case is also distinguishable from *Harris* in that

> *Harris* was a case where no claim [was made] . . . that the police knowingly engaged in calculated misconduct in order to secure the disputed evidence. Moreover, it does not appear that the purpose of the police in *Harris* in securing the disputed evidence was to impinge on the suspect's right to remain silent or his right to testify. In these respects, *Harris* is manifestly distinguishable and thus inapposite to the present case.

Cooper, 963 F.2d at 1249 (brackets in the original) (internal quotation marks omitted) (citing *Harris*, 401 U.S. at 224).

[8] The second factor is that in California out-of-court statements admitted for impeachment are also admitted for the

truth of the matters asserted therein, *i.e.*, also admitted for substantive purposes. *See* Cal. Evid. Code §§1220, 1235. Thus, in California, out-of-court statements admitted for impeachment are, in fact, admitted for the purpose of proving the defendant's guilt. No limiting instruction was given in this case that Henry's post-Miranda statements could be used only to assess Henry's credibility, the classic use of prior inconsistent statements for impeachment, but not to establish the truth of the matters asserted therein. In fact, in this case, the primary evidence which established Henry's motive and rebutted his claim of self-defense was Henry's post-*Miranda* statements. Thus, it is a misnomer to say that Henry's post-*Miranda* statements were admitted for "impeachment." Their primary use was to establish an essential element of the crime charged, as the prosecution argued.

[9] Based on the specific facts of this case, we conclude that the State should not be permitted to use post-*Miranda* statements where the officers set out deliberately to violate a suspect's *Miranda* rights and the evidence obtained in violation of *Miranda* is used to prove the defendant's guilt, even though it is admitted in the guise of impeachment. Thus, for this further reason, we conclude that the state trial court erred in permitting the prosecution to use Henry's post-*Miranda* statements for the truth of the matters asserted therein, as well as for impeachment as a prior inconsistent statement.

B. Harmless error.

We must next decide whether admission of the statements for impeachment purposes was harmless error. *See Arizona v. Fulminante*, 499 U.S. 279, 295 (1991); *Pope*, 69 F.3d at 1025. In the context of habeas review, the standard is whether the error had substantial and injurious effect or influence in determining the jury's verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). We must conduct this analysis "with an awareness that 'a confession is like no other evidence,' and that a full confession may have a 'profound impact' on the

trier of fact." *Pope*, 69 F.3d at 1025 (quoting *Fulminante*, 499 U.S. at 296).

[10] We hold that the introduction of Henry's post-*Miranda* statements for impeachment purposes had a substantial and injurious effect on the jury. The critical evidence used to establish Henry's motive for the shooting was the challenged statements to the police, since the State primarily relied on Henry's confession to prove that his motive for killing Withrow was not fear and self-defense, but his desire for revenge.

At trial, Henry testified that he feared Withrow and his associates because he had seen Withrow with guns at home and in the office, and he had heard that Withrow's associates were Hell's Angels. Henry stated that when he went to meet with Withrow, he took his guns with him for the purposes of protecting himself; he had not planned to kill Withrow. Henry argued that he shot Withrow because he thought Withrow was reaching for a gun in the drawer and was about to shoot him.

After Henry's testimony, the prosecution called Detective Machen, one of Henry's interrogators, as a rebuttal witness. The prosecution introduced the tape-recorded interview of Henry to show that the defendant had not told police officers he killed Withrow in self-defense, nor told the officers that he thought Withrow was reaching for a gun when Henry shot him. In closing arguments, the prosecutor mentioned the interrogation, and argued that during the interview Henry "couldn't give an answer why he took those guns or he didn't want to admit why he took them." Importantly, the prosecutor referred to Henry's motivation for shooting Withrow as "the crux of the case."

[11] The State's use of the challenged statements went to the root of their burden to prove beyond a reasonable doubt that Henry acted with the intent required for a conviction of first or second degree murder, and not in self-defense. This

use of Henry's confession had a substantial effect on the verdict. No other evidence of intent could have impressed the jury in the same way that defendant's own statements did, *see Fulminante*, 499 U.S. at 296, particularly because his confession was played in full for the jury. The error in admitting Henry's statements was substantial and injurious.

Accordingly, because Henry's post-Mirandized statements were involuntary, and the error in admitting Henry's statements had a substantial and injurious effect on the jury's verdict, we grant Henry habeas relief on his Fifth Amendment claim.[4]

III. Constitutional Privacy Claim

Henry also seeks habeas relief on the ground that his constitutional right to privacy was abridged when the state trial court compelled his doctor to testify concerning confidential doctor-patient communications.[5] Henry argues that his communications with Dr. Sander, a medical doctor whom Henry believed to be a psychotherapist, should have been constitutionally privileged. The factual predicate for this claim is undercut, however, by the fact that Dr Sander was not a psychotherapist and the state court's finding that it was not reasonable for Henry to believe that Dr. Sander was a psychotherapist. There can be no psychotherapist-patient priv-

[4]Henry additionally contends that the district court erred in granting the State's motion to strike his declaration of his state of mind at the time of his confession. We need not reach this argument, however, because we grant habeas relief on Henry's Fifth Amendment claim.

[5]In his state court trial, Henry asserted that his communications to Dr. Sander were privileged under Cal. Evid. Code § 1014, which provides that the patient may refuse to disclose and may prevent anyone else from disclosing confidential communications between the patient and his or her psychotherapist. *See* Cal. Evid. Code § 1014(a).

ilege or right to privacy based thereon, constitutional or otherwise, if there is no psychotherapist.[6]

[12] Moreover, there is no constitutional psychotherapist-patient privilege, only a federal evidentiary one. Although the Supreme Court, in *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996), recognized a psychotherapist-patient privilege, it looked exclusively to the Federal Rules of Evidence for authorization. Henry has pointed to no Supreme Court or Ninth Circuit case which recognizes a constitutional privilege for psychotherapist-patient communications, nor any cases which use *Jaffee* to support a constitutional psychotherapist-patient privilege. Therefore, at best, Henry's challenge to the admissibility of Dr. Sander's testimony and notes is a challenge to an evidentiary ruling based on state law.

[13] A federal habeas court, of course, cannot review questions of state evidence law. On federal habeas review, we may consider only whether the petitioner's conviction violated constitutional norms. *See Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991). Even where it appears that evidence was erroneously admitted, a federal court will interfere only if it appears that its admission violated fundamental due process and the right to a fair trial. *See Hill v. United States*, 368 U.S. 424, 428 (1962); *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993).

[14] Henry has not made a showing that the admission of Dr. Sander's testimony violated due process or his right to a fair trial. At Henry's trial, two witnesses testified that Henry had complained to them about Withrow's handling of his money and property; one of these witnesses further testified that Henry had commented to her that he should do the world a favor and kill Withrow. Thus, Dr. Sander's testimony regarding Henry's confidences did not constitute the only evi-

[6]California has no physician-patient privilege in criminal proceedings. *See* Cal. Evid. Code § 998.

dence that Henry had stated he felt like killing Withrow, or that Henry might have been motivated by revenge. Henry has failed to demonstrate that the admission of Dr. Sander's testimony and notes so fatally infected his trial as to render it fundamentally unfair or that the violation of his privacy resulted in a complete miscarriage of justice. *See Jammal*, 926 F.2d at 919. Accordingly, we affirm the district court's denial of habeas relief to Henry on his constitutional privacy claim.

IV.

Since Henry's post-Mirandized statements were involuntary, and the error in admitting those statements was substantial and injurious, we grant habeas relief on the Fifth Amendment claim, and reverse the district court's denial of the petition for writ of habeas corpus. The case is remanded to the district court with directions to issue a conditional writ of habeas corpus ordering Henry's release, unless the State of California shall retry Henry within a reasonable period of time without using his post-*Miranda* confession.

REVERSED and REMANDED with directions.

APPENDIX D

FILED
NOV. 3, 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BOBBY HENRY,	)	
	)	
Petitioner-Appellant,	)	No. 98-15768
	)	
v.	)	DC No. CV 95-2055-DAD
	)	
PEGGY KERNAN, Warden; DANIEL E. LUNGREN, Attorney General,	)	**O R D E R**
	)	
Respondents-Appellees.	)	

Before: SNEED, TASHIMA, and SILVERMAN, Circuit Judges.

Appellees' motion to stay issuance of mandate is granted. Issuance of the mandate is stayed for 90 days to enable appellees to petition for a writ of certiorari. See Fed. R. App. P. 41(d)(2)(B).

APPENDIX E

INTERVIEW OF BOBBY GENE HENRY

9-6-88 AT 1429 HOURS

WHITE: I got 1429, is that correct?

MALE VOICE: Yes it is.

WHITE: And you're Bobby Gene Henry, right?

HENRY: Yes, right.

WHITE: The address you gave when arrested, that's your current address?

HENRY: Um huh.

WHITE: You live there by yourself?

HENRY: Um huh.

WHITE: Just for your information we had your car towed and ah if you want to we can give it to somebody or else its going to end up costing a lot of money. Is there anybody you want to turn the car over to?

HENRY: You can give it to my ah my ex-wife.

WHITE: What's her name?

HENRY: Nora.

WHITE: You have a phone number or something on her.

HENRY: Ah its 965-3035.

WHITE: Where does she live?

HENRY: In ah Citrus Heights, Mariposa Avenue.

WHITE: Do you know the address?

HENRY: 5656.

WHITE: Ah the keys that were in the car, other than the car keys, those little rings, are they to your house or something?

HENRY: No that was my gate and my mailbox key.

WHITE: Okay, is there a key to your house?

HENRY: No.

WHITE: It's not locked.

HENRY: No you just have to open it up the second window up and reach in and unlock it.

WHITE: Um huh.

MACHEN: (Inaudible) Where were you born?

HENRY: In Oklahoma.

MACHEN: And ah where do you work?

HENRY: Mcclellan Air Force Base.

MACHEN: And what do you do for them out there?

HENRY: Ah I'm called an equipment specialist now.

WHITE: Whereabouts do you work.

HENRY: Building 2 -

WHITE: (Inaudible)

HENRY: Building 269-G.

WHITE: You got a phone number out there.

HENRY: (Clearing throat) Excuse me, yes sir, 643-3582.

WHITE: And your social security number.

HENRY: 547-62-4801.

WHITE: Have you ever been arrested before.

HENRY: No sir.

WHITE: Who do you notify in case there's an emergency, would it be your ex-wife?

HENRY: Yeah.

WHITE: (Inaudible) continue at this point. How long have you been divorced.

HENRY: Two years

MALE VOICE: (Inaudible)

MACHEN: Now according to (inaudible) first of all What's your phone number up in Rescue?

HENRY: 677-5581.

WHITE: Before we go any further we have to advise you of your rights. You're under arrest for murder.

HENRY: yeah.

WHITE: You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to have an attorney present before your questioned. If you can't afford an attorney one will be appointed free of charge before any

questioning. You understand your rights Bobby?

HENRY: I think so.

WHITE: You think so.

HENRY: I don't know, (inaudible) I mean

WHITE: You have any questions about your rights.

HENRY: (Inaudible) can I have my_lawyer here, I don't know

WHITE: That's ah up to you; you're entitled to have an attorney present before you're questioned

HENRY: Right. Probably should have one now.

WHITE: You do want an attorney?

HENRY: Yes, please.

WHITE: Why did you shoot him anyway.

HENRY: Pardon.

WHITE: Why did you shoot him.

HENRY: Cheated me out of money, I was loosing my property.

WHITE: How much money you talking about.

HENRY: I couldn't figure it out, it was so scrambled up, I think it was, I don't know, like, maybe fifty thousand.

WHITE: How - how did he have your money, anyway.

HENRY: I gave it to him.

WHITE: Was it cash you gave to him.

HENRY: I wrote him checks. Am I supposed to keep taking without an attorney. Was I

WHITE: Listen, what you tell us we can't use against you right now.

HENRY: Okay.

WHITE: We'd just would like to know

HENRY: Okay. It started two years ago after the divorce and ah and I got drunk and left and took off in my jeep and had a wreck and ah I ah ended up in the hospital ah at Kaiser ah ah had some kind of head injury, I don't know what it was I ruined my shoulder cause it the socket wouldn't stay in place anymore and ah,

and some other things, and then after I got out of the hospital it was September 14th ah my wife left, had left I mean she was leaving she had a boyfriend and ah (inaudible) and ah I was alone and I that's where it gets screwed I was, I went, I had some properties I used to have rentals and stuff and I worked after work and I bought old houses and fixed them up and (inaudible) nothing fancy just you know just worked on them and ah so I went to try to ah sell one of them and I sold it to Bill. Well I didn't sell it to Bill I went and asked him went back to him ah I wasn't gonna go back with him because it was something before I sold a piece of property and got messed up in escrow but I remember saying I wasn't going to go beck there but then I went back and I had some industrial property (inaudible). I had this I trusted him

I just trusted him and he sold it to somebody, I mean ah sold it to somebody and the guy was supposed to be real good (inaudible) and he wasn't right from the start. Am I found myself begging for my money and then we were going to get into some kind of real estate 60 acres up by Meadow Vista and we was gonna split it 60-40 and ah I had some money and I had good credit and we bought that up there and we you know it was he was gonna turn it in 24 hours cause I had a big income tax bill, cause I sold that property of his.

WHITE: The one on Bell Avenue.

HENRY: Yeah. I had a big tax bill and I didn't have any money left to pay it and we was he assured me don't worry about it we got this we get this other property and turn it in 24 hours and he's got a friend in L.A. I don't

know (inaudible) he's looking to come up here, he's a cement contractor and ah the time came and I wrote checks to him, I don't know why, I wrote $11,000 or more right now and right now I can't believe where I got this money.

WHITE: Why were you writing checks to him.

HENRY: Ah I don't know.

WHITE: Was he asking you for the money.

HENRY: I - I really don't know that either, I for some reason I wrote

WHITE: You got any records of all this?

HENRY: Well in my file cabinet in my trailer. I tried to figure this out a couple year - something like something was telling me something was wrong and I couldn't figure it out. I'd sit down and try to papers nothing was going right paperwork okay. Ah my ex she was on some of the properties and she signed papers

too. Ah but she always threatened to do everything so she was trusted and I was trusting Bill and I - I don't know that ah guy he sold that property to and ah went Bill had claimed that he kinda ah commission on it he said the guy would pay him out of escrow so that he wouldn't have to pay taxes on it or something. And I'm not that way at all, I work for the government I - I (inaudible) my interest for so God damn long and wouldn't do that shit.

WHITE: So this guy's never paid anyone on that deal.

HENRY: Well he paid and he paid and he paid and then Bill owed him some money and then the guy I guess the money that Bill owed him went there and I was signing notes on that property up in Meadow Vista. I just got to the point where I knew he was manipulating me I knew - well I'll tell you what happened

about, ah I was signing for notes we were supposed to get some engineering work done down here at ah there was an engineering place up on Roseville Road and I - I'd go in there and I'd talk to the people and the next day it'd be all mixed up and ah maybe not the exact next day but within the week and it'd be all messed up again and then they wouldn't be doing something right but I thought things were going it was like we had to have some money for engineering to do some road work to develop and stuff. I signed the notes cause the property was in my name. We had an agreement a verbal agreement I guess on the 60-40 so I signed those notes, but I never seen the money just disappeared he was it went in his pocket or I never seen it.

WHITE: Didn't show up (inaudible)

HENRY: Well it kept going so long sometime last year I got I got mad cause I had about $15,000 of my money in there, somewhere around that much, I'm not sure I tried to figure out how much I got in there, tried to make notes and I told him I wanted out of it I couldn't I was living on credit cards and didn't have any money you know to when my wife and I split up and divorced there was enough money, equity in the rentals to to pay her off, her house and stuff that she's in I had to buy that and I would get to keep my property. My property was free and clear and we owed some money on some credit cards cause I was building a house and using credit cards and stuff. Trying to do it myself and ah now I got a note that coming thats come due already on a second extension on it and Bill talked he talked me he talked me into getting that

money borrowing getting some money against it.

WHITE: (Inaudible)

HENRY: On my property.

WHITE: The one in Rescue.

HENRY: Yeah.

WHITE: And with a note

HENRY: Forty five thousand, yeah.

WHITE: And this is you gave him the whole forty five thousand?

HENRY: No, I think that thats where I think the ten I wrote I wrote a check for him ah cause his house was in foreclosure. I loaned him two credit cards. I - I wasn't this kind of person before I was to tight with the dollar, it took me to long and I been taking care of work and just taking care of myself since I was 15 years old. And not smart I just wasn't afraid to work.

WHITE: So

HENRY: So he got its like I had that money and don't worry we're going to sell this other property real fast. I didn't even keep the money to pay my income taxes and I got penalized and they were coming down on me and ah ah there was some ambulance company was after me cause I didn't pay the bill, I never got a bill and then I just went and called them and ah theres a lot happening in the last two years you know I just and ah I just called them and they sent me a bill and I turned it into the insurance they paid it but everything was ah

WHITE: (Inaudible) for a couple of years

HENRY: Yeah, this ah I went to a psychiatrist at Kaiser last year and just before Christmas I think I don't remember dates just can't put them in there and times just don't cause I was really I just laid in bed and I was gonna kill

myself the only thing I laid there for a whole week ah I went through two or three job changes since I I couldn't remember the job when I got back to work that I had so I said well if I can't remember well make a change. I really think you know some of this sounds so God damn phony to me but I remember thinking that but then when I went up to this other place I couldn't handle the job I couldn't remember my old job and then I got this new job and then they reorganized three times and the boss was you know I talked to them I talked to them about the what I did you know and everybody's got problems and ah I think Bill Withrow was laundering the money, I think it was drug money but I don't know. I think he said that to me one time that that guy that bought the property on Bell Avenue from me was he said made a

comment like he's the biggest dealer in northern California. And then

WHITE: What's the address on Bell Avenue.

HENRY: Ah its there was three houses on it its 2026 is one of them I think. There are three houses right together.

WHITE: Sold to one guy?

HENRY: Yeah.

WHITE: But you don't know his name?

HENRY: Yeah, I knew the name.

WHITE: What's the name.

HENRY: Now this is gonna sound phony but should I keep something like this to bargain I don't know, God I just I just did a stupid thing today I went down there to, God damn I went to scare him and I didn't Jesus Christ.

WHITE: Well let me ask you this

HENRY: I yet they're crooks, they're crooks, when I see Bill was telling me my job was so bad

and my ex he had me mad at my wife and he knew all this stuff about me he ah and just kept doing that and I when I finally went to the psychiatrist I realized that it wasn't them it was him and if something was trying to tell me that I was being screwed or didn't you know something was trying to tell me. Ah then he had us the guy's name ah Will Estey.

WHITE: Who?

HENRY: Will or William I guess its Will ah I'll tell

WHITE: What's his last name?

HENRY: Estey, E S T E Y. You'll see some papers I have all my papers up there. I was a little bit afraid of him for my kids I may still be I - now I don't always know where I heard all stuff. I remember I asked Bill afterwards I said what'd you tell me he was a dealer or something. But I - I don't know, I you know I - I don't know where I heard it but

WHITE: Let me ask you this when you were having this problem with your job and going over and to a psychiatrist I want to go over that.

HENRY: I think it was this last year.

WHITE: 1987.

HENRY: Yeah, I think it was Christmas or maybe after the - the dates I don't know.

WHITE: So then the things that really got you concerned as a as of late excuse the note you opened the note on your own property there

HENRY: And I just didn't have any more money, I was, I owed the bank before about twenty thousand dollars on those credit cards and during one of the property's or something we got into I had to pay those credit cards off in order for him - us to get it and he'd he would I know he's forged my name on a document before ah and I went away deer hunting last year and I gave him power of attorney just to

close an escrow. He borrowed money against the property and when it closed I had to get paid off.

WHITE: You ever talk to anybody else about this.

HENRY: I tried, I didn't know where to - I didn't have any more money to go to an attorney I didn't you know, I tried to call - I tried to call the sheriff's department, I tried to call the either the attorney general or district attorney one of them, I'm not sure and they referred me to a - a real estate thing and I ah I just I had all I could handle I just didn't think I could handle any more you know I was trying to keep my job and I worked for 22 years out there well 18 and 4 in the service. I ah

WHITE: So this morning when you were just going over there, to scare him?

HENRY: I called him and told him these promises been dragging on you got to get the money to me

I got to get the money and he ah and I was supposed to call today to find out about it and then well its gonna be maybe next month and he just kept doing that and I took the gun and I don't know why I took the God damn gun down there. God damn!

WHITE: They both your guns?

HENRY: Yeah.

WHITE: And that was your briefcase?

HENRY: I - I have other guns in my house too that you'll find up there I just God damn. Just got back from a week end and went up and set up a deer camp was gonna go deer hunting next week end I guess. (inaudible)

WHITE: When you got over to the office what happened?

HENRY: I told him I didn't, you know, well I called and Bill won't call you back you know the secretary will put you on hold and ah she -

she said she said that about twenty or twenty-five people was calling him yelling and screaming at her to get money out of him. But Bill well I been around him for twelve years you know that something or other happened I said I wouldn't go back with him and I used to go to his house and his kids call me Uncle Bob and Jesus Christ.

WHITE: Well it sounds to me like you lost control of it for a while. Ah ah (inaudible) from what you've told us so far your intentions wern't [sic] to go over there wasn't to shot

HENRY: (Inaudible) I don't I killed one last year the first time I ever got to go out of state.

WHITE: So what'd you - what was your conversation like with him.

HENRY: I told him the bills are due I got to make a payment on that house that Nora's in and I didn't have any money. I didn't have any

money to date with except credit I got credit cards back up to eighteen thousand or some bullshit like that. They were paid off once but I just none of the money came back from him that he owed me and the promises and ah (inaudible) kids and his kids and

WHITE: So what you're telling me (inaudible)

HENRY: He said well I'm working on a deal and it may close and may get the money next month but I heard that over and there was one deal that closed and I was supposed to get twenty-five thousand dollars in money out of it and it was when I sold that my what interest I had I didn't get any profit on that place in Meadow Vista. We bought it for a hundred thousand dollars and he turns his commission into it he does that on properties and it never shows up like a profit so he doesn't pay taxes on it. So I had we were

supposed to split 60-40 and he was supposed to come up with 60 percent of the down payment with his commission and whatever and I went I'd been I had to go TDY back to Dayton, Ohio and I just called him one day to see how things were going and he said oh great I'm glad you called he needed extra money that he didn't have. I had to call the banker to get the money over to he didn't have his part and it kept dragging it was supposed to turn and sell cause I was living on my credit cards again and ah when ah I the guy Bill owed that guy I had the that guy refinanced Bell Avenue and Bill was supposed to pay the note fee or loan fee well I got stuck with it. Bill was supposed to pay for it it was four thousand or something and that guy had some money coming from somebody on an escrow up in Swansborough country

and when he got it I was supposed to get a check for the money that I had in that property and then there's a ninety-eight hundred dollar C.D. that I had to put down as security on that property up there. He was ah he was making payments on it ah I I've been threatened you know by the bankers and stuff because I took the credit cards back away from him because he maxed them out and then contacted those people and tried to get an extension on the credit and stuff and I was it was my credit cards that loaned to him and I couldn't get him to stop and I couldn't get the credit card people to help me. They said because I let him use them all the time.

WHITE: How long ago was that.

HENRY: That's still going on. I'm still getting I changed credit card numbers on two of them I gave him two credit cards. That was

supposed to be to keep track of our deal on the Meadow Vista property but ended up with Christmas shopping and everything else on it it was supposed to been so we could keep track of meals and any kind of work we did that transpired on that property up there in Meadow Vista.

WHITE: What banks or credit cards are those.

HENRY: One is ah one is, one is ah Western Savings and Loan and the other one is ah something bank card ah if you looked in my file cabinet up there there's I put BW by Bill's ah credit cards and I'd go over to collect the money for the payment on the credit cards and the checks would bounce and I'd have to send them back through or go out and cash them at his bank. And ah

WHITE: You have quite a file up there.

HENRY: Yeah well yeah but I can't figure out I was doing so (inaudible) I used to think I was pretty good I always did all my own papers and stuff except my taxes I had people do them. But I always knew where things were at I knew which one where the money was and everything but last year I couldn't keep track and the last couple years I couldn't keep track of anything I just find things in the wrong folders and I tried to sort them out and I'd sit down and spend the whole weekend and but not really get anything done cause I just couldn't focus on what the heck was going on.

WHITE: And was it like that before your divorce or after your divorce.

HENRY: It was after.

WHITE: (Inaudible)

HENRY: (Inaudible) Ah never had any problems before ah

WHITE: Did your wife kind of take care of all that stuff (inaudible)

HENRY: I did it all.

WHITE: (Inaudible)

HENRY: Just my kids

WHITE: How old are the kids.

HENRY: One is seven, one is ah fifteen.

WHITE: (Inaudible)

HENRY: Huh.

WHITE: Getting back to the weapons. What transpired today (inaudible) when Bill ah standing up or sitting down when this all started?

HENRY: I think we were sitting down at his desk and I was talking to him about not having any money and I needed some money and why he hadn't paid on something in two years and ah

and ah I don't know my ah I don't know I don't know if I got notes against what I got cause I don't really know what all I signed. He used to have ah there's a young girl there that used to work for him that was a notary public and she just leaves her book there and comes back later and signes [sic] it whatever and you know doesn't really witness the things in it. He put in there note one note that he borrowed against some property he put down that he had ah power of attorney and he didn't but I signed it in the notary book because I kept thinking he was gonna pay me and I just it was just I just I just

WHITE: You sat in one chair and put your briefcase in another chair?

HENRY: I sat down. Just sit it there

WHITE: In other words he was sitting behind his desk?

HENRY: Huh.

WHITE: He was sitting behind the desk.

HENRY: Yeah.

WHITE: Did you fire both guns?

HENRY: I'm sure I did. I - I don't - I don't remember why I took two guns. (Inaudible)

WHITE: They were both working.

HENRY: Yeah. I keep them I used to keep them in the little dresser cabinet drawer there under my clothes at night but I really did go over there, afraid of what, I didn't know I you know if this Will Estey was good or bad or whatever but there was another secretary that used to work there when she quit working there he seemed to have a scam that he gets people that are in a depressed state or something and then kinda takes advantage of them and she was going through a divorce. She was a secretary and I started talking to her away

from there, and ah she was afraid of Will Estey too.

WHITE: What was her name.

HENRY: Her name's Kathy Morrall. I hate to do this I know she's still going through a lot of problems and

WHITE: Kathy who?

HENRY: Morrall. I hate to do this I know she's still got a lot of problems and

WHITE: You know a phone number you got on her

HENRY: It's ah probably in my, my trailer's a mess. It's probably up there she's she lives out in ah

WHITE: Where?

HENRY: Off Hazel as you go from Madison toward the river. She was afraid for her son ah she was ah I think Bill mentioned one time that he could hire 15 people to ah keep somebody in there (inaudible) I can't remember how he said it.

WHITE: He seems to be a pretty well liked for the Honorary Mayor of Fair Oaks and has a lot of plaques and stuff up there. He obviously (inaudible) huh?

HENRY: Well I think that if you talk to that Kathy she - you'll find out that he's getting to a lot of people in Fair Oaks. I think even the Sacramento Bee would put an ad in the paper for him without money first. I don't know, I just, I'm - I don't know if I imagined all this stuff or just

WHITE: Well didn't some (inaudible) was it the Union? Somebody did a big story on him. Wasn't it a while back.

HENRY: And that was another thing

WHITE: Well what was that story about?

HENRY: I didn't read it somebody tried to show that to me out at work and and I they said hey, they knew Bill was a friend and they said here's a

story about your friend and I said ah I just I'd already decided I wasn't gonna deal with him so I didn't read it I just I never read it, I never and ah the time he told me he that he got sued but he won cause the woman was just ah had done the same scan before or something he won this lawsuit or something I don't know. I didn't you know if he was everything was okay why couldn't he get credit and why did we let him use our credit cards. And I paid more I didn't have - they wern't [sic] paid off completely but I kept making extra payments on them cause the people kept the credit card companies kept calling and saying you're way over the limit five hundred dollars or something like that send the money or we're gonna do something whatever they were gonna do and I'd panic and send the money and I was paying more

money than what I had owed on it. I was paying, I was payomg [sic] his bills and I don't know, God

WHITE: The way this was handled after this happened and you left and went over to (inaudible)

HENRY: Yeah, I just, I was running I didn't know I didn't know where I don't know. I - I never have run or hid from anybody before I was heading - I think I was gonna go go home but I didn't know, you know, up in Rescue I don't know. I - I stopped I mean Jesus Christ I sorta

WHITE: Any reason why you went to Baseline.

HENRY: Just, I don't know (inaudible) I don't know, scared I don't know, i don't know. i ah you know just went ah ah we were fixing my jeep back up and had the brother in law come by last year and said he'd fix it up and then it was last year or the year before. And I

would of, and I said he could fix it up cause I had a (inaudible) I just put on not too long ago. It was an old jeep and I just (inaudible) and ah I paid him for his labor and parts cause he was out of work and needed some money and I let him have the jeep and I signed the pink slip over to him cause I was afraid he would drive it without insurance on it and I'd get sued. Then he took it to Stockton and started it out then left my sister, I know I hurt a lot of people and ah I'm just, you know, ah.

WHITE: I know.

HENRY: There's guys we left over in Viet Nam and who said they had it so rough once (inaudible)

WHITE: Okay, well we're like you and wished it never happened but

HENRY: Well I'm sorry guys

WHITE: Unfortunately it happened and you know I'm we can kinda understand how things happened before

HENRY: Oh God (crying) EverythIng seemed okay yesterday, I was just okay. (Inaudible) we went and took the trailer and my car the trailer up in the woods and (inaudible) I just love being out there. My boss was not boss this is the second or third boss I've had in the past two years and two or three days after he got on the job he was talking about down grading me and and cause I was incompetent or something. I tried (inaudible) didn't know how to pray. (Inaudible) I was just feeling sorry for myself and (inaudible) And my older daughter hasn't come up in a couple years she's been gone for two years now. (Inaudible) I don't know, maybe I'm not a nice person I

WHITE: Yeah. Who knows what happens when you get under all this strain and pressure you know.

HENRY: Yeah, but (crying - inaudible)

WHITE: We're not saying its right though Bobby

HENRY: (Crying) I know

WHITE: But

HENRY: I wanted to be with you guys I took that exam eleven years ago and I had I thought I'd better keep my job until I pass it. I had to take a physical and somebody I always wanted to be I wanted to be a highway patroleman [sic] before I went into the service.

WHITE: You want to call your ex-wife and tell her what happened.

HENRY: (Crying) No

WHITE: Cause it's gonna be on the news, it's gonna be in the papers.

HENRY: (Crying) Yeah, I better tell her my babies I don't know what to do she

(END OF TRANSCRIPTION)